No. 07-1491

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IN THE

Supreme Court of the United States

LARRY CRAWFORD, Director of the Missouri Department of Corrections, CYNDI PRUDDEN, Acting Superintendent Women's Eastern Reception, Diagnostic and Correctional Center, in her official capacity,

Petitioners,

—v.—

JANE ROE, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals properly held that the Missouri Department of Corrections policy prohibiting inmates from obtaining non-therapeutic abortions violates the Fourteenth Amendment?

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STATEMENT OF THE CASE

This case arises from the official policy of Defendant Missouri Department of Corrections (MDC) prohibiting pregnant inmates from obtaining medical care for non-therapeutic abortions (the Policy). As recounted in the decisions below, prior to September 2005, "the MDC had a policy of providing transportation outcounts for inmates wanting to terminate their pregnancies." Pet'r App. A2. The inmate herself was responsible for paying the costs of the abortion procedure. Pet'r App. A24. However, in 2005, the MDC altered its policy and determined that "[o]utcounts for elective abortions will no longer be authorized." Pet'r App. A3 (internal quotation marks omitted).[1] As the Eighth Circuit further found, the Policy is not "a specific application of a general policy regarding elective procedures." Pet'r App. A13 n.6. Rather, "abortion is treated differently than other elective procedures." *Id.*

After the MDC repeatedly denied Plaintiff Jane Roe's request for an abortion she sought emergency injunctive relief in federal district court, which issued a preliminary injunction requiring the MDC to transport her to a medical facility outside of

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[1] The State characterizes the Policy as allowing transports for therapeutic abortions as "determined by physicians exercising their professional judgment on a case-by-case basis." Pet'r Br. 2. However, as the Eighth Circuit explained, under the terms of the Policy, even an abortion indicated due to a threat to a pregnant woman's life or health is only authorized if "approved by the Medical Director in consultation with the Regional Medical Director." Pet'r App. A2 (internal quotation mark omitted). In any event, this case is not about how the Policy applies to women in need of therapeutic abortions, an issue not raised by the plaintiff class, which includes only women seeking non-therapeutic abortions.

the prison. Pet'r App. A1. The State's multiple attempts to stay that preliminary injunction were rejected by the district court, the court of appeals, and this Court. *Roe v. Crawford*, 396 F. Supp. 2d 1041 (W.D. Mo. 2005) (denying stay of Oct. 13, 2005, preliminary injunction), *stay denied*, No. 05-3790 (8th Cir. Oct. 14, 2005), 546 U.S. 959 (2005). Before obtaining the abortion procedure, Roe amended her complaint to seek relief on behalf of a "class consisting of all women in the custody of the MDC who seek elective, nontherapeutic abortions," and the district court certified the class. Pet'r App. A1-2. After completing discovery, the parties each moved for summary judgment. The district court granted declaratory and injunctive relief in favor of the plaintiff class, holding that the Policy violated the Fourteenth Amendment right to choose abortion and the Eighth Amendment right to receive treatment for serious medical needs.

The Eighth Circuit affirmed. It held that the Policy did not violate the Eighth Amendment, but that it was, under *Turner v. Safley*, 482 U.S. 78 (1987), an unreasonable prohibition on Plaintiffs' Fourteenth Amendment rights. Pet'r App. A21.

REASONS FOR DENYING THE WRIT

The Court should decline to review this case because the Eighth Circuit correctly held the Policy unconstitutional under the Fourteenth Amendment, and the State has failed to identify any "compelling reasons" for granting review. *See* Sup. Ct. R. 10. The Eighth Circuit's analysis adheres to the standards established by this Court for reviewing inmates' constitutional claims, *see, e.g., Turner v.*

Safley, 482 U.S. 78 (1987), and applies precisely the same *Turner* standard used by every court to consider policies obstructing incarcerated women's access to abortion care. *See infra* pp. 4-5. Indeed, the absence of a circuit split confirms that this case implicates no unsettled or conflicting standards of law and does not warrant this Court's review.[2] Further, the decision below is wholly consistent with this Court's precedent and does not, as the State contends, conflict with *Maher v. Roe*, 432 U.S. 464 (1977).

First, the State insists, as it did below, that a woman's right to choose abortion does not survive incarceration and, thus, that its Policy prohibiting abortion is simply not subject to constitutional review. Pet'r Br. 5-6. This argument was rightly rejected by the Eighth Circuit as one that "does not withstand analysis." Pet'r App. A6 n.2. Nonetheless, the State continues to advance this proposition in an attempt to create an unsettled question of federal law where none exists. The court of appeals cogently explained the inconsistency between the State's view – that restrictions on incarcerated women's ability to obtain abortion necessarily escape *any* constitutional review – and this Court's precedent:

> Although some rights may be so inherently inconsistent with

[2] Just this term, this Court declined to review a state appellate court decision that applied the same standard. *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007) (applying *Turner* and holding unconstitutional county jail's prohibition on abortion unless inmate first obtained judicial authorization for transport), *cert. denied*, 128 S. Ct. 1704 (2008).

> incarceration, such as the right to travel, that any assertion of the right while in prison would automatically fail, even rights that are, in part, inconsistent with incarceration survive imprisonment, at least enough so that the *Turner* balancing test applies. . . . In [*Turner*], the Supreme Court recognized that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration." [*Turner*, 482 U.S.] at 95, 107 S. Ct. 2254. But, the right to marry does not completely disappear upon imprisonment. *See id.* at 96, 107 S. Ct. 2254. . . . . Logically, this same analysis holds true for access to abortions as well. Certainly, no prisoner could simply elect to leave the institution at will to obtain an abortion. This does not, however, mean any exercise of the right is entirely inconsistent with incarceration, any more than is marriage, or the right to correspond with persons outside of the facility. *See Turner*, 482 U.S. at 91-92, 107 S. Ct. 2254.

Pet'r App. A6 n.2. Indeed, every court to address the issue has recognized that the right to abortion survives incarceration. *See Victoria W. v. Larpenter*, 369 F.3d 475, 483-84 (5th Cir. 2004); *Bryant v. Maffucci*, 923 F.2d 979, 982-85 (2d Cir. 1991); *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 334 n.11 (3d Cir. 1987); *Roe v. Leis*, No.

C-1-00-651, 2001 WL 1842459, at *3 (S.D. Ohio Jan. 10, 2001); *Doe v. Barron*, 92 F. Supp. 2d 694, 696 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258, 1261 (Ariz. Ct. App. 2007).[3]

Similarly, consistent with every other court to review a prison or jail policy restricting abortion access, the Eighth Circuit applied the *Turner* balancing test, under which a prison policy that "impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests," 482 U.S at 89. *See Victoria W.*, 369 F.3d at 483-84 (applying *Turner*); *Monmouth*, 834 F.2d at 338-44 (same); *Roe v. Leis*, 2001 WL 1842459, at *2 (same); *Arpaio*, 150 P.3d at 1262 (same). As an initial matter, the Eighth Circuit emphasized that the MDC's total ban "goes far beyond" the court-order requirements for abortion challenged in the *Victoria W.* and *Monmouth* cases. Pet'r App. A12. As the court of appeals explained: "Once incarcerated in the MDC, an elective abortion, which the Supreme Court determined is a liberty interest protected under the Fourteenth Amendment, is *entirely* unavailable." Pet'r App. A11. Applying *Turner*, the court of appeals then weighed this complete deprivation of plaintiffs' rights against each of the "alternate ways in which the policy

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[3] *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2002), cited by the State, Pet'r Br. 6, does not conflict with this uniform consensus. *Gerber* rejected a prisoner's claim that he had a right to procreate by means of providing sperm for artificial insemination while incarcerated. That decision, and the underlying rationale – that "loss of the right to intimate association is simply part and parcel of being imprisoned," 291 F.3d at 621 – does not apply to the right to choose abortion.

purportedly advances security interests." Pet'r App. A8. It concluded that the "MDC policy represents precisely the 'exaggerated response to . . . security objectives' that *Turner* forbids. *Turner*, 482 U.S. at 97-98." Pet'r App. A12-13.[4] The State does not even suggest that the Eighth Circuit was wrong in determining that the Policy is far more restrictive than those reviewed by other courts, or in determining, as did those courts, that the *Turner* standard applies. The State therefore has not identified any unsettled question of law or conflict among the lower courts that warrants this Court's resolution.

Second, the State's assertion that the decision below warrants review because it conflicts with this Court's decision in a Medicaid funding case, *Maher v. Roe*, 432 U.S. 464 (1977), *see* Pet'r Br. 3, is equally untenable.[5] In *Maher*, this Court upheld

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[4] Security was the only interest the State offered in defense of the Policy in its initial appeal to the Eighth Circuit. *See* Pet'r App. A6-10. The State did not argue that its preference for childbirth over abortion should render the Policy "constitutionally sustainable," or that a contrary conclusion would conflict with *Maher*, Pet'r Br. 4, until filing a petition for rehearing. Because that petition was denied, this argument was never addressed by the Eighth Circuit.

[5] Aside from the fact that the State's reliance on *Maher* is so clearly unfounded, the Court should decline review on this issue for prudential reasons. The State raised *Maher* in its brief opposing plaintiffs' motion for summary judgment in the district court, but then abandoned it on appeal to the Eighth Circuit. It was thus never addressed by the Eighth Circuit even though the State belatedly tried to raise it again in an unsuccessful petition for rehearing. *See supra* n.4. Under these circumstances, this Court should decline to consider it. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970)

Connecticut's decision to pay the costs of childbirth but not abortion for indigent women. In so doing, this Court explained that Connecticut "may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it . . . imposed no restriction on access to abortions that was not already there." 432 U.S. at 474. In short, this Court upheld the regulation because it "place[d] no obstacles absolute or otherwise in the pregnant woman's path to an abortion." *Id.* In contrast, the MDC Policy *does* create an "absolute" obstacle. As the Eighth Circuit found, and the State conceded, the Policy makes non-therapeutic abortion "*entirely* unavailable" to women once they are in the custody of the MDC. Pet'r App. A11. This critical distinction renders insupportable the State's contention that the MDC's Policy is "no different" than the Medicaid regulation upheld in *Maher*, and that the Policy simply advances a state preference for childbirth in a similar fashion, Pet'r Br. 5. Thus, the Eighth Circuit's decision – that the MDC's Policy unconstitutionally bans abortion for incarcerated women – is consistent with *Maher* and with this Court's decisions invalidating state laws that go well beyond discouragement to effectively prohibit abortion. *See Maher*, 432 U.S. at 473-74 (explaining that Connecticut funding regulation was "different in kind from the laws invalidated in our previous abortion decisions," for example those that

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("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *see also Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (holding that where respondent raised arguments for the first time in a response to petitioner's motion for rehearing in the court of appeals it was untimely and precluded consideration).

"interposed an absolute obstacle") (internal quotation mark omitted).

CONCLUSION

For the foregoing reasons, the State's petition for a writ of certiorari should be denied.

Respectfully submitted,

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